

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

NEW ENGLAND CARPENTERS  
HEALTH BENEFITS FUND, PIRELLI  
ARMSTRONG RETIREE MEDICAL  
BENEFITS TRUST; TEAMSTERS  
HEALTH & WELFARE FUND OF  
PHILADELPHIA AND VICINITY; and  
PHILADELPHIA FEDERATION OF  
TEACHERS HEALTH AND WELFARE  
FUND,

Plaintiffs,

v.

FIRST DATABANK, INC., and  
McKESSON CORPORATION,

Defendants.

CIVIL ACTION: 0:07-mc-00038-RHK-  
JSM

Assigned to: Judge Richard H. Kyle  
Referred to: Magistrate Judge Janie S.  
Mayeron

**PLAINTIFFS' OPPOSITION TO NON-PARTIES  
AMERISOURCEBERGEN CORPORATION AND DENNIS LINDELL'S  
MOTION TO QUASH THE SUBPOENA ISSUED BY PLAINTIFFS  
OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER**

Plaintiffs regret the burdens experienced by third parties AmerisourceBergen Corporation ("ABC") and Mr. Lindell in this lawsuit. However, contrary to the arguments set forth in their Motion to Quash the Subpoena Issued by Plaintiffs or, in the Alternative, for a Protective Order ("Motion to Quash"), Plaintiffs have not disregarded these burdens or sought unnecessary discovery from a third party. Instead, Plaintiffs are seeking necessary and important testimony from Mr. Lindell that goes straight to the heart of this case: testimony that, unlike McKesson, ABC did not participate in purported "wholesaler surveys" that contributed to the WAC-AWP mark-up alleged in this case.

While it is true that Plaintiffs seek to elicit precisely the same testimony from Mr.

Lindell as they obtained in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 145, Master File No. 01-cv-12257-PBS (the “MDL litigation”), they are seeking this testimony because McKesson – not Plaintiffs – has refused to stipulate to the admissibility of this prior testimony.<sup>1</sup> While Plaintiffs recognize that this is an unfortunate situation for ABC and Mr. Lindell, Plaintiffs did try to minimize their burdens, but McKesson has thwarted those efforts. Accordingly, Plaintiffs respectfully request that the Court deny ABC’s Motion to Quash, and decline to order Plaintiffs to pay ABC’s costs and attorneys’ fees.

### **ARGUMENT**

This Court should not quash Plaintiffs’ subpoena or order Plaintiffs to pay ABC’s costs. Plaintiffs have made clear to ABC’s counsel that they are willing to use Mr. Lindell’s deposition testimony given in the MDL litigation in lieu of deposing him in this action. However, McKesson has refused to stipulate to the admissibility of Mr. Lindell’s MDL testimony in this case, purportedly because McKesson did not have an opportunity to cross-examine Mr. Lindell at the MDL deposition.

Plaintiffs have always contended that McKesson’s position was disingenuous because McKesson has clearly been monitoring the progress of the AWP Litigation for some time and therefore could have sought to appear at Mr. Lindell’s MDL deposition.

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<sup>1</sup> Plaintiffs request that the Court exercise its discretion and remit this matter to the District of Massachusetts for resolution, given the District of Massachusetts’ familiarity with both the underlying litigation and the MDL Litigation. *See* Fed. R. Civ. P. 26(c) advisory committee’s note (“The court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending.”).

However, it was not until ABC and Mr. Lindell filed their Motion to Quash that Plaintiffs learned that McKesson's position had no merit whatsoever because McKesson had *specifically foregone* the opportunity to attend Mr. Lindell's deposition. As set forth in Exhibit B to the Motion to Quash, McKesson *specifically* discussed cross noticing the earlier deposition with ABC but McKesson decided not to do so.

Plaintiffs should not be penalized for McKesson's gamesmanship when they have, in contrast, been nothing but forthcoming and reasonable with ABC, Mr. Lindell and their counsel. This is particularly true because the MDL Litigation is an entirely separate case that, contrary to representations in the Motion to Quash, has never been officially designated as related or coordinated with this action. While there is significant overlap amongst the facts and counsel, the underlying claims, classes, parties and allegations are independent and have always been litigated by Plaintiffs as separate cases. Plaintiffs had no obligation to coordinate discovery.

Finally, Rules 45 and 26 do not support ABC's request that Plaintiffs pay its costs and attorneys' fees relating to this deposition. Rule 45(c)(1) only gives the Court discretion to award appropriate sanctions (such as attorneys' fees) when the subpoena imposes an undue burden or expense. According to the 1991 Advisory Committee Notes, Rule 45(c)(1) was intended primarily to protect "a non-party witness as a result of a misuse of the subpoena." *Molefi v. Oppenheimer Trust*, No. 03 CV 5631, 2007 U.S. Dist. LEXIS 10554, \*6 (E.D.N.Y. Feb. 15, 2007). Courts must determine whether the subpoena imposes an undue burden on the subpoenaed party, and, if so, what, if any "reasonable steps" the subpoenaing party took to avoid imposing such a burden. *Id.* at

\*7. Under this test it is clear that Plaintiffs have not *misused* the subpoena; indeed, there is nothing that Plaintiffs can do now to minimize the burden imposed on ABC or Mr. Lindell. McKesson is the only party that can eliminate the burden by acknowledging the inevitable result of its refusal to attend Mr. Lindell's MDL deposition in the first instance.

WHEREFORE, Plaintiffs respectfully request that the Court deny the Motion to Quash and all other relief that this Court deems just and proper.

DATED: June 8, 2007

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

NEW ENGLAND CARPENTERS  
HEALTH BENEFITS FUND, PIRELLI  
ARMSTRONG RETIREE MEDICAL  
BENEFITS TRUST; TEAMSTERS  
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**WORD COUNT COMPLIANCE**

I, Daniel C. Hedlund, hereby certify that Plaintiffs' Opposition to Non-Parties AmerisourceBergen Corporation and Dennis Lindell's Motion to Quash the Subpoena Issued by Plaintiffs or, in the Alternative, for a Protective Order complies with Local Rule 7.1(C).

I further certify that, in preparation of this Memorandum, we used Microsoft Word XP, and that this word processing program has been applied specifically to include all text, including headings, footnotes and quotations, in the following word count.

I further certify that the above-referenced brief contains 929 words.

Dated: June 8, 2007

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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NEW ENGLAND CARPENTERS  
HEALTH BENEFITS FUND; PIRELLI  
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FUND,

Plaintiffs,

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FIRST DATABANK, INC., a Missouri  
Corporation; and McKESSON  
CORPORATION, a Delaware  
Corporation,

Defendants.

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Case No. 05-cv -11148

Judge Patti B. Saris

**AMENDED CERTIFICATE OF SERVICE**

I hereby certify that on July 9, 2007, I caused Plaintiffs' Opposition to Non-Parties AmerisourceBergen Corporation and Dennis Lindell's Motion to Quash the Subpoena Issued by Plaintiffs or, in the Alternative, for a Protective Order, to be filed electronically with the Clerk of Court through ECF and served by facsimile upon those parties noted below. Those attorneys who are registered with the Electronic Filing System may access these filings through the Court's System, and notice of these filings will be sent to these parties by operation of the Court's Electronic Filing System.

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Dated: July 9, 2007

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